

OECD Development Policy Tools



# Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations



# Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the member countries of the OECD or its Development Centre.

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

**Please cite this publication as:**

OECD (2017), *Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations*, OECD Development Policy Tools, OECD Publishing, Paris.  
<http://dx.doi.org/10.1787/9789264274914-en>

ISBN 978-92-64-27491-4 (PDF)

Series: OECD Development Policy Tools  
ISSN 2518-3702 (online)

The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.

**Photo credits:** Cover design by the OECD Development Centre based on images  
© m.wolf/shutterstock.com.

Corrigenda to OECD publications may be found on line at: [www.oecd.org/about/publishing/corrigenda.htm](http://www.oecd.org/about/publishing/corrigenda.htm).

© OECD 2017

---

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of the source and copyright owner is given. All requests for public or commercial use and translation rights should be submitted to [rights@oecd.org](mailto:rights@oecd.org). Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to the Copyright Clearance Center (CCC) at [info@copyright.com](mailto:info@copyright.com) or the Centre français d'exploitation du droit de copie (CFC) [contact@cfcopies.com](mailto:contact@cfcopies.com).

---

## Foreword

This *guidance* is an output of the CONNEX Negotiation Support Forum that was established with financial support of the German Federal Ministry for Economic Cooperation and Development, as an integral part of the OECD Policy Dialogue on Natural Resource-based Development's Work Stream 3 on "Getting Better Deals". The CONNEX Negotiation Support Forum fosters a dialogue on topics relevant for the G7 CONNEX Initiative. This Initiative, launched at the G7 Brussels Summit in 2014, provides developing countries with multidisciplinary and concrete expertise for negotiating complex commercial investment contracts, with an initial focus on the extractive sector.

Since December 2015, the CONNEX Negotiation Support Forum has provided an institutional platform for the tripartite dialogue among partner countries, support providers and investors. The CONNEX Negotiation Support Forum has improved the mutual understanding of the host governments' objectives to use their resources for economic prosperity and sustainable development and the investors' objectives to protect their interests and manage their risks. While no silver bullet solution exists, the CONNEX Negotiation Support Forum is building a shared knowledge base to bridge asymmetry of information and capabilities; building mutual trust and a collective understanding among stakeholders of each other's interests, positions and limitations; and fostering alignment towards shared objectives, common standards and workable approaches to develop durable and balanced extractive contracts.

This *guidance* was developed in response to a demand from developing countries to receive support on how to assemble and manage a multidisciplinary team, to engage effectively in complex extractive contract negotiations. Annexed to this *guidance* is a *terms of reference template* that governments may use to recruit and to monitor external advisers supporting extractive contract negotiations. The template can assist governments with the selection of appropriate national or foreign advisers, and has been developed with a view to improving the quality of advice. The template can also be utilised by support providers, such as the newly founded CONNEX Support Unit, who recruit external advisers on behalf of governments for the same purpose.

However, the *guidance* is not intended to provide comprehensive advice to governments on how to negotiate contracts. It is also not its objective to detail each and every aspect of pre-negotiation, but to provide an overview of the preparatory work that may be required prior to the commencement of negotiations. In line with this, it aims to help governments to put in place efficient processes and to identify the skills and expertise that governments may need to prepare for and to conduct effective contract negotiations. Finally, it suggests ways to ensure co-ordination within government and better integration between government officials and expert advisers.

The *guidance* may not be applicable to all contexts; rather, it is designed to assist those countries where contracts are likely to be subject to different political points of pressure that often rise to the surface at the end of negotiations and can lead to sub-optimal results. The *guidance* does not purport to be exhaustive and will need to be tailored to the specific country-context, the specific nature of the deal, and the applicable development phase of the project. We are confident that the *guidance* will help host governments to develop well informed and unified negotiating positions, ensure their ownership of the negotiation process, and shape durable contractual relationships.

We would like to thank all the members of the Friends of CONNEX Negotiation Support Forum who have invested time and effort to inform the development of this document and who have provided valuable feedback on preliminary drafts. We would also like to express our appreciation for the Natural Resources for Development Unit of the OECD Development Centre who supported the drafting process and served as Secretariat.

The Co-Chairs

**Mr Günther Nooke**  
Personal Representative of the German  
Chancellor for Africa  
Federal Ministry for Economic Cooperation and  
Development  
Federal Republic of Germany

**H.E. Mr Abdoulaye Magassouba**  
Minister of Mines and Geology  
Republic of Guinea

## Acknowledgements

The OECD Initiative for Policy Dialogue on Natural Resource-based Development is led by Lahra Liberti, Head of the Natural Resources for Development Unit, under the direction of Mario Pezzini, Director of the OECD Development Centre. This *guidance* was prepared by Lahra Liberti, Catherine Anderson and Elliot Smith serving as the Secretariat of the CONNEX Negotiation Support Forum, a multi-stakeholder dialogue platform jointly established by the G7 CONNEX Initiative and the OECD Development Centre's Work Stream 3 on Getting Better Deals. The *guidance* benefited from input received by the Friends of CONNEX working group who met via teleconference on 29 September, 20 October and 10 November 2016 to review the subsequent drafts prepared by the Secretariat of the OECD Development Centre. The Friends of CONNEX working group was composed of Germany and Japan, Guinea and Liberia, Total and Exxon Mobil, African Minerals Development Centre, African Legal Support Facility, Commonwealth Secretariat, NEPAD agency, together with a number of academic institutions and expert organisations (such as Advocates for International Development, Harvard Business School, International Growth Center, International Senior Lawyers Project) and law firms (Artus Wise, Jones Day, and Mayer Brown, LLP). The OECD Development Centre engaged the group in an iterative consultative process to inform the structure and content of the document, and ensure its practical use. The draft *guidance* was submitted for discussion at the Seventh Plenary Meeting of the OECD Policy Dialogue on Natural Resource-based Development held on 30 November and 1 December 2016 and was revised in light of comments received during and soon after the meeting. The revised *guidance* was circulated under the written procedure among participants in the Policy Dialogue for final comments and subsequently finalised for public release. The authors are grateful to the publication team in the OECD Development Centre.



## Table of contents

<b>I. OWNERSHIP OF THE PROCESS, EMPOWERMENT AND COMPOSITION OF THE GOVERNMENT NEGOTIATION TEAM</b> .....	9
Ownership of the negotiating process .....	9
Empowerment of the government negotiation team .....	9
Composition of the government negotiation team.....	10
Negotiation mandate .....	11
Who should sit at the negotiating table? .....	11
<b>II. EXPERTISE NEEDED FOR EFFECTIVE CONTRACT NEGOTIATIONS</b> .....	13
Geological, engineering and industry expertise .....	13
Geological and engineering expertise .....	13
Industry expertise (knowledge of a specific industry).....	14
Legal, economic, financial and fiscal expertise.....	14
Legal expertise.....	14
Economic, financial and fiscal expertise .....	15
Conducting due diligence on the investor.....	16
Human rights, community engagement and environmental expertise .....	16
Human rights and community engagement expertise .....	16
Environmental expertise.....	17
Where to source the required expertise? .....	18
<b>III. ACCOUNTABILITY AND REPORTING</b> .....	19
Role of the lead negotiator.....	19
Reporting back to the ultimate decision maker.....	19
<b>IV. EFFECTIVE INTEGRATION OF EXTERNAL ADVISERS</b> .....	21
<b>V. RETAINING EXPERTISE FOR FUTURE USE</b> .....	22
<b>ANNEX: RECRUITING ADVISERS FOR EXTRACTIVE CONTRACT NEGOTIATIONS – TERMS OF REFERENCE TEMPLATE</b> .....	23
Purpose.....	23
Guiding principles .....	23
Harmonisation and alignment .....	23
Knowledge transfer and capacity development .....	23
Quality control .....	24
Background.....	25
Objectives/Scope.....	25
Role of the adviser.....	26
Tasks and functions .....	26
Deliverables.....	27
Selection criteria .....	27
Qualifications.....	27
Skills and experience.....	28
Competencies.....	28
Location.....	29
Remuneration.....	29



<b>Evaluation criteria</b> .....	29
Quality-based selection .....	29
Cost-based selection .....	31
<b>Fiduciary obligations</b> .....	31
<b>Reporting and supervision</b> .....	33
Inception report or study .....	33
Interim reports .....	34
Final report .....	34
<b>Application process</b> .....	34
<b>Appendices</b> .....	34
<b>Notes</b> .....	35

## **I. OWNERSHIP OF THE PROCESS, EMPOWERMENT AND COMPOSITION OF THE GOVERNMENT NEGOTIATION TEAM**

### **Ownership of the negotiating process**

Ownership of the negotiating process is crucial to ensure durable contracts. The government is expected to ensure full ownership and control of the process in order to reach an effective and durable negotiation outcome, particularly in the event advisory services are partly or wholly financed by development partners.<sup>1</sup>

### **Empowerment of the government negotiation team**

To be effective, the authority to negotiate and enter into contracts should be clearly conferred by law, statutes, presidential or ministerial decree.

Depending on applicable legislation, a lead agency or an inter-ministerial committee may be authorised to negotiate contracts and to make decisions on behalf of the government, although the final authority to ratify or veto the contract may ultimately rest with the head of government or the parliament. For example, in Nigeria, production sharing contracts are entered into with the Nigerian National Petroleum Corporation (NNPC), a wholly-owned government corporation which is authorised by law to participate in Nigeria's upstream petroleum sector. In Liberia, the Hydrocarbon Technical Committee is an inter-ministerial body which is empowered to negotiate petroleum contracts. The committee is chaired by the chief executive officer of the National Oil Company of Liberia (NOCAL) and includes the ministers of justice, finance, lands, mines and energy, labour, as well as a legal adviser to the president, the chairman of the National Investment Commission and a representative from the Environmental Protection Agency. In practice, the structure adopted largely reflects the political economy of the countries at stake, including its level of transparency and democracy.

Given the integrated nature of extractive sector investment, the establishment of inter-ministerial committees can help to ensure that: (i) the government retains collective responsibility; (ii) different views among different agencies representing different sectors are reconciled before negotiations with investors begin, subject to any further adjustment as negotiations proceed;<sup>2</sup> and (iii) senior level buy-in by all relevant ministries and agencies exists, which is good for both the government and the investor. In particularly important or challenging negotiations or where decision-making is centralised, an inter-ministerial committee may be chaired by the head of government (president or prime minister) bringing authority and credibility to the negotiation process. Engagement of the head of government can serve to facilitate or ensure the active participation and contribution of the relevant ministries, and enables the head of government to address any conflicts between these agencies during the negotiation process. Participation by the head of government also signals to potential investors the strategic importance of the investment to the government.

Where an inter-ministerial committee is not in place or established, the lead negotiating agency/entity is nonetheless advised to hold a kick-off consultation meeting with all relevant agencies, and with potentially affected communities, prior to the formal launch of negotiations. These meetings can be used to identify and shape the government's position on key aspects of the negotiation strategy, to engage the wide range of agencies that may have an interest in the outcomes of the deal,<sup>3</sup> and to ensure that the government has a clear understanding of community interests. Regular consultation and interaction with relevant government agencies is important as many

of these agencies will be responsible to implement and monitor the contract throughout the lifecycle of the project. The lead agency is further advised to continue to engage these relevant agencies in the negotiation process – both directly (in ‘real time’) and indirectly – and in implementation and monitoring of the resulting contract.

### Box 1. Empowering contract negotiators in Guinea

Guinea has created a Strategic Committee and a Technical Committee by Decree which was enacted within the general legal framework for mining.<sup>4</sup> The Technical Committee, which has 17 members, is responsible for contract review, review of documents, production of reports, recommendations to the Strategic Committee, and, where necessary, the conduct of negotiations with companies.

The Technical Committee reports to the Strategic Committee and is composed of members with the authority to act on behalf of their respective agencies of government. It represents the following institutions:

- Presidency (1 member);
- Prime Minister’s Office (1 member);
- Ministry of Mines and Geology (3 members);
- Ministry of Finance and the Economy (Budget) (1 member);
- Ministry of Environment (1 member);
- Ministry of Public Works (Transport) (1 member);
- Ministry of Local Administration and Decentralization (1 member);
- Ministry of Justice (1 member);
- Administration of Large Projects (1 member);
- Guinean Company for Mining Resources (SOGUIPAMI) (1 member);
- Central bank (1 member);
- Civil Society (1 member); and
- Unions (1 member).

The Strategic Committee is composed of four Ministries: Mines and Geology, Economy and Finance, Justice and Public Works and Transportation and reports directly to the President and to the Council of Ministers.

## Composition of the government negotiation team

The lead agency or inter-ministerial committee may set up a technical team to conduct the negotiation itself. To be effective, this team should be both multi-disciplinary and multi-sectoral, in order to ensure that it is both technically effective and that it adequately reflects inter-agency and sector interests. This team should also be legally empowered or formally delegated to conduct the negotiations and make decisions on behalf of the respective agencies of government and will be responsible to report back to the lead agency or to the inter-ministerial committee. In Ghana, the legislative framework empowers the minister of petroleum to represent the Republic in the negotiations of the terms of a petroleum agreement and enter into the agreement on behalf of the Republic. The minister sets up a negotiation team made up of senior

officials from the ministry of petroleum, the Ghana National Petroleum Corporation, the attorney-general's department, the ministry of finance, the Environmental Protection Agency, the Ghana Revenue Authority and the Petroleum Commission.

### **Negotiation mandate**

It is important for the government (head of government, lead agency or the inter-ministerial committee) to set clear parameters for the negotiations, by providing the negotiation team with a clear mandate, which defines the scope for the negotiations, including the terms of reference, powers and function of the negotiation team itself, what is expected to be achieved, those elements that are subject to negotiation (and conversely those that are not), and the scope of the team's negotiating position in each of these areas.

The negotiation team is expected to regularly consult relevant government agencies and any external experts, and to seek inter-governmental and expert inputs on the negotiating process and on the terms of the deal itself. The government agencies that may need to be consulted will differ depending on the nature and specific phase of the extractive project and the applicable regulatory framework.

It is recommended that the members of the negotiation team prioritise the negotiations, and be relieved of competing responsibilities throughout the course of the negotiations. Governments and investors may also wish to share information regarding the composition of their respective negotiation teams to establish whether both parties are allocating the same expertise. This can help set and understand mutual expectations early on in the process.

### **Who should sit at the negotiating table?**

The lead agency/entity empowered to undertake negotiations (ministry, inter-ministerial or technical committee or national resource company) should appoint a lead negotiator for the length of the negotiations in question. Preferably, this position should not be a minister or a political appointee, but rather a senior government official. This person should also have the management and leadership skills needed to direct the negotiation team.

The lead negotiator should have a clear mandate from the lead agency/entity responsible to conduct negotiations on behalf of the government, and the authority to agree to the terms of the deal, subject only to (if relevant) legislative or executive approval of the final contract. In jurisdictions where decision-making power is centralised, it is vital for whoever is leading the negotiation team to gain the confidence of the head of state or the head of government.

Not every agency will need to participate directly in the negotiations, and the lead agency/entity is advised to carefully consider the most appropriate size and composition of the negotiation team. The team should have the core skills and expertise needed to be able to negotiate effectively on all pertinent elements of the contract, and yet it should not be so large as to create dysfunction. It is advisable to constitute a core negotiation team comprising: the ministry of finance, the ministry of planning, the revenue authority, the attorney general, ministry of justice, ministry of mines/petroleum and geology, and environment.

The larger is the composition of the negotiation team, the greater is the chance of divergent views between different ministries and agencies, which could be exploited by an investor or degrade investor confidence.

On the other hand, a larger team with legal, financial, industry and community experts in the room can work if only the lead negotiator is allowed to speak in the negotiations. Frequent breaks can give other members of the team the opportunity to voice their views to the lead negotiator.

Relevant government agencies and experts that are not at the table should be on 'standby' throughout the negotiation process to provide 'just-in-time' advice and support. If negotiations are held outside of the host country (for example, in the home country of the investor or in a third party jurisdiction), these 'standby' agencies and experts may be required to provide advice by phone, over the internet or by flying in as needed.

It is recommended that the organisation and management of the negotiation team remain flexible to allow for additional and unforeseen expertise to be brought in as needed.

## II. EXPERTISE NEEDED FOR EFFECTIVE CONTRACT NEGOTIATIONS

Negotiating a contract does not happen in isolation but, rather, is a pivotal step in a series or chain of events needed to secure a productive investment. These steps include: (a) setting of a strategic vision for the development of the sector; (b) establishing a knowledge and information base; (c) conducting due diligence on prospective investors; (d) investment appraisal; and (e) conducting negotiations. The nature and composition of the team and any expert advisory support sought by government may differ at varying stages of the process (i.e. pre-negotiation or negotiation) or according to the scope and specific phase of the investment project.

In order to assist the government with the necessary planning and preparation, including the setting of a strategic vision for the development of the sector and understanding of possible alternative scenarios and outcomes, the types of expertise needed should be identified early on in the negotiation process, before actual contract negotiations formally begin. Indeed, most of the issues that need to be well appraised from the very beginning goes beyond the sector and relate to infrastructure development, public-private partnerships, investment climate, dispute avoidance and resolution. If these issues are not well understood from the start, negotiations are doomed to fail. That's why when constituting a negotiation team, it is important to consider, not only the skills and expertise needed for the negotiation itself but those that will be needed to ensure that the negotiations are well-informed. Governments are also advised to ensure that they have the necessary capacity to implement the contract in accordance with the terms agreed. If the required capabilities and resources do not exist, the government negotiation team should adjust the negotiating position accordingly.

The skills and expertise that may be required for the government to know its resource base and negotiate an extractive contract are specialised and diverse but can broadly be categorised into the following three clusters:

- Geological, engineering, and industry expertise, which can enable the government to develop solid and evidence-based negotiation positions.
- Legal, economic, financial and fiscal expertise, to undertake due diligence, achieve optimal contractual arrangements and maximise the positive spill-overs of the project.
- Social and environmental expertise to situate the contract in context.

### Geological, engineering and industry expertise

Technical expertise is required to understand the productive and development potential of the assets subject to negotiation. It is important for governments to have a clear understanding of the potential for extraction and development, the anticipated costs, and the prospects for export or domestic processing before negotiations begin.

#### Geological and engineering expertise

A geological specialist who can understand and interpret technical data and studies, and who is familiar with relevant international industry standards is needed to ensure that the negotiation team is equipped to identify and address any concerns, and that the geological and engineering aspects of the extractive project are given sufficient weight during the negotiations.<sup>5</sup>

Where the information is made available, the expert should be able to review the investor's assumptions on the grade, quality and quantity of the commodity it expects to produce and whether the investor's timeframe and extraction methods are realistic and achievable.

## Industry expertise (knowledge of a specific industry)

Depending on the nature of the investment and of the commodity in question, the government may wish to seek advice on industry trends or global market dynamics, including the role of key players, and to ascertain whether the proposal submitted by the investor is consistent with industry standards and practice. It would also be of value for the government to benefit from expertise in similar extractive projects in the region (and worldwide if necessary) in order to assess any assumptions made regarding production potential, project timelines and costs.

## Legal, economic, financial and fiscal expertise

### Legal expertise

It is recommended that competent well versed local and international legal experts be an integral part of the negotiation team. Legal experts can assist with the drafting of model contracts as the initial basis for contract negotiations. The use of model contracts, developed through an open and inclusive consultative process, can help entrench best practice and reduce room for negotiations. In this case, the role of the legal expert would be to facilitate internal agreement and seek to reconcile views from different ministries and agencies, prior to any negotiations with investors. The government is also advised to obtain the legal expertise needed to prepare draft provisions tailored to the specific characteristics of the project as may be required.

At a minimum, the government is advised to ensure that the team has the legal expertise needed to review draft contractual provisions to ensure that these are consistent with the legal and regulatory framework of the host government, and that they reflect all material elements of the decisions reached during negotiations. Legal experts may also need to assure that the contract is consistent with any financing obligations imposed or likely to be imposed by any current or potential future financing partners.

Legal experts should be able to advise on the full range of contractual provisions, including any legal uncertainties of the proposed extractive project, and on the inclusion of, and the effect of financial and fiscal provisions; resource management provisions (land, water and energy for example); change of control provisions, investment protection provisions (including stabilisation clauses); force majeure, hardship, changed circumstances and any other triggers for the renegotiation of the financial (or other) clauses of the contract; and dispute resolution mechanisms.

Legal experts may need to consider whether the government has entered into any relevant bilateral or multilateral investment treaties and whether this will have an impact on the negotiation of certain provisions of the extractive contract.

Governments will likely have their own internal legal advisers who are familiar with the national legal system but who may not be familiar with extractive contracts, international arbitration procedures or international law. Local legal capacities may not be commensurate with the legal capacities of the investor. It is often the case that the investor will have a highly qualified and experienced legal team in place, and significant resources to draw on. It may also be the case that the national legal experts do not have the skills or expertise required to turn negotiated solutions into contractual terms. Consequently, there is a need for a broad range of legal skills in any extractive contract negotiation, and if this capacity is not available domestically, governments will need to procure it externally. If external legal advisers are procured, governments should make sure that external legal advisers work together with domestic legal experts (government lawyer or local lawyer).<sup>6</sup>

## Economic, financial and fiscal expertise

Macroeconomic and/or macro forecasting skills are typically needed to enable governments gauge the expected contribution of the project to the country's existing macroeconomic outlook, both in terms of its contribution to the extractive sector and the wider economy, but also as a function of the sector's overall contribution to GDP (Gross Domestic Product).

In addition to macro-economic and macro-forecasting skills, financial expertise is also required to develop cash flow models under a range of conditions (e.g. resource size, commodity prices, resource quality, cost, etc.) that reflect the project risk. An independent study allows the government to evaluate and compare any financial and fiscal proposals that the investors may bring.

Any fiscal experts recruited to assist the government to negotiate a contract should have particular knowledge and experience in the design and implementation of fiscal terms for the extractive sector. Fiscal expertise is required to optimise fiscal design, by taking into consideration the different fiscal options and trade-offs (flat/progressive royalty provisions, production sharing, tax, uplift and amortisation rates, cost recovery, and the effects of any bonuses, rentals or fees etc.) that may apply to the extractive project.

Complex corporate structures can create risks of base erosion and profit shifting (including, for example, through transfer pricing), which can have a direct effect on revenue collection under the contract. Extractive fiscal experts can help the negotiation team to fully understand these structures in order to make informed decisions on specific terms of the contract (e.g. use of affiliate services, intra-group commodity transactions, intra-group use or transfer of intangibles, interest deductions).

During the lifetime of a contract (which can be 30 years or more), commodity prices and exchange rates can fluctuate dramatically and this can fundamentally alter the balance of the contract. Experts can assist governments to evaluate the range of measures that might be adopted (including, for example, limited scope of stabilisation provisions, responsive fiscal terms, periodic review clauses) to enable the parties to the contract to make any necessary adjustments in response to a change in economic conditions.

Before actual negotiations begin, economic expertise is required to consider how best to leverage the capital investments expected to be brought by the project for the country's economic and productive development in terms of linkages (backward, forward and horizontal) to possibly broaden local industry participation and develop other sectors of the economy.

Extractive projects can provide the opportunity to generate jobs and develop local supply chains; and governments should seek economic expert advice on the potential and barriers for local job creation, industry participation and supplier development.<sup>7</sup>

It is also critical to consider the infrastructure demands of the project, and whether any new infrastructure will be needed (which could be provided by an industry expert), and their links to the wider infrastructure demands and priorities for the country. For example, will the project connect with the national electricity grid or will a new power station need to be built? What impact will the proposed extractive project have on water management? Will there be enough groundwater available to support the new development? What is the impact on other users? Further consideration should also be given to the means by which any existing and proposed infrastructure investments will interact, and the potential for shared use. For example, the development of an oil and



gas field may be linked to the construction of a mid-stream or down-stream processing facility, such as a pipeline, a refinery or a LNG plant.

For any infrastructure that is proposed to be constructed or existing infrastructure that needs to be upgraded, advice should be sought to determine who will be responsible for the construction of the infrastructure; who will pay for it; who will retain ultimate ownership of it; who will benefit from its use; and who is responsible for the upkeep and maintenance of the infrastructure (including potential decommissioning requirements) going forward. Consequently, expertise should be sought on options for financing infrastructure (for example through a public-private partnership), on construction, and on the maintenance of the infrastructure over the long term.<sup>8</sup>

### **Conducting due diligence on the investor**

Undertaking due diligence on the investor's business model and capability, also reflecting its strategic interests, serves to assist the government to gain confidence that it is negotiating with a suitable and qualified investor. Due diligence further serves to detect poorly resourced or speculative investors and ensure that the investor is equipped to deliver on the terms of the contract.

Issues to be considered may include: (i) the operating history of the investor (e.g. how long has it been operating? In which jurisdictions? What is the global volume of production? Is the investor vertically integrated, using the output in its own facilities abroad? How has it engaged in dispute resolution?); (ii) corporate structure and business model (e.g. how is it funded? Who is the ultimate beneficial owner?); (iii) human rights record (e.g. how has it engaged with local communities and governments in other projects and jurisdictions, particularly in other developing countries?); (iv) financial capacity (e.g. does the investor have, or is it likely to have, the financial capability to execute the contract, including clean-up/decommissioning operations?).

#### **Box 2. Due diligence in Ghana**

During the renegotiation of a contract between the Republic of Ghana and the Volta Aluminium Company (Valco), Ghanaian officials began gathering information on the strengths, weaknesses, and goals of aluminium companies six months prior to the renegotiations. Officials analysed the international costs of production of aluminium and marketing strategies that multinational aluminium companies used. Consequently, when the renegotiations commenced, the Ghanaian negotiation team were well informed about the strategic interests of Valco.<sup>9</sup>

## **Human rights, community engagement and environmental expertise**

### **Human rights and community engagement expertise**

Human rights and community engagement expertise is an integral part of tailoring a specific contract to the context in which it applies. Extractive projects are often located in and around areas where people live. The human rights and social impacts of a project can be extensive and include (but are not limited to): land use and rights; water use; displacement and resettlement of local communities and their rights; management and implementation of security; disaster management; health risks that can arise from extractive projects; use of labour in line with international norms and standards; mine

closure/decommissioning. Carefully considering the human rights implications of projects during negotiations can help ensure that projects bring benefits to people and that their potential adverse impact is managed appropriately.<sup>10</sup> Consequently, specific expertise is required in order to ensure that the government's obligation to protect human rights and the corporate responsibility to respect human rights are reflected in the negotiating agenda. This will help secure potential positive human rights impact and allow to make informed decisions on how best to allocate responsibilities for the prevention, mitigation and remedy of negative human rights impact throughout the project's life cycle.

Specific human rights expertise may be required on aspects related to the identification of operating standards necessary for the protection of human rights (such as internationally recognised guidelines or standards set by lenders or international industry bodies) to supplement domestic laws as appropriate; to review early impact assessments, due diligence assessments or other initial project preparation, and assist with the development of an initial plan to communicate with potentially affected individuals and communities on the project's risks of adverse impact in order to involve them in the development of prevention and mitigation plans.<sup>11</sup>

Poor communication between government and affected communities is a common source of grievance or dispute, not only between the local community and the investor but also between the government and the investor, and between the government and the community itself. Consequently, expertise in community engagement and conflict prevention can assist the government to negotiate a sustainable deal that will be supported by local communities.<sup>12</sup> In order to inform the government's negotiating position, and to ensure that the government has a clear understanding of community interests and concerns, it is in any case advisable for the government to engage communities before negotiations begin, and to revert after the negotiations are concluded to share the details of any resulting agreement. Disclosure of information about the project and its impact is an integral part of meaningful community engagement. Community engagement could take a variety of forms, and should be tailored to reflect the nature and extent of community impacts involved. Experts have a critical role to ensure that community engagement is built in an integrated manner, reflecting the three-way relationship between governments, investors and communities.

Community relations expertise would also be needed to identify potentially affected communities (e.g. women, youth or indigenous peoples) and to engage with them in good faith in a two-way and responsive manner. Often this expertise is best sourced locally, through universities (anthropologists, sociologists, etc.) or community based groups with established and trusted relationships with the host community. Relevant agencies, either directly or through the use of experts, should be familiar with relevant applicable international standards and have the knowledge and training to be able to effectively review, evaluate and take appropriate and timely action on social impact assessments.

### **Environmental expertise**

Environmental expertise is an important part of any contract negotiation to determine the expected environmental footprint of the project. This is particularly important if the proposal raises significant environmental concerns, for example, if the project is located in or adjacent to a national park or wildlife reserve or has the potential to contaminate local water sources or render large areas of land infertile or unproductive following the closure or decommissioning phase.

An environmental expert should either conduct or review an environmental impact assessment, and may need to provide advice on appropriate contractual provisions for environmental protection, any mitigation measures, rehabilitation planning (at or before project closure), and the establishment of baseline data for measuring these issues before the operations begin.

Expertise may also be required across the full spectrum of ecosystem services, which may include (but is not limited to): hydrology, soil protection, biodiversity, marine mammal observation, tailings disposal, oil spills, and acid mine drainage.

### Where to source the required expertise?

The host government should consider whether it has the capacity to staff each of the above listed areas of expertise using domestic capacity and resources or whether external assistance will be needed; and, if so, how that assistance will be procured.

Before recruiting foreign experts, governments should seek out and retain, including through the mobilisation of the diaspora,<sup>13</sup> a cadre of national experts, with both technical and context specific skills, for example legal advisers proficient in domestic law, environmental specialists, macro-fiscal specialists and tax and customs advisers.

In some more specialised technical areas, for example, in geological analysis, hydrocarbon or mining production, hydrocarbon or mining legal and contractual analysis and drafting, and extractive sector fiscal modelling, such expertise may not be readily available on the domestic market and the government may be required to recruit highly qualified, experienced foreign advisers to fill the gap. The Negotiation Support Portal (<http://negotiationsupport.org/>) provides the details of several support providers that can assist governments in the negotiation of extractive contracts.

### III. ACCOUNTABILITY AND REPORTING

#### Role of the lead negotiator

The lead negotiator (senior government official) will be accountable to the lead agency/entity responsible for negotiating the contract, and will be required to establish that the deal accords with the mandate received, the parameters of the terms of reference, and any overarching negotiation strategy. If, during the course of the negotiation, the terms of the deal fall outside of the parameters of the terms of reference, the lead negotiator would be required to report back to the lead agency/entity to review and potentially adjust the scope of the negotiation mandate.

Where an inter-ministerial committee has been established, the negotiation team is accountable to it for the process, and for the content of the contract negotiation. Depending on its mandate, the negotiation team may need to seek the views of the inter-ministerial committee on key milestones during the negotiations and may need to defer some key decisions to the inter-ministerial committee. It is also important that any expert adviser recruited to assist the government with contract negotiations has access to each member of the inter-ministerial committee, to ensure clear and direct lines of communication. Language can sometimes be a barrier, and it may be necessary to recruit interpreters to facilitate these exchanges.

Extractive contracts typically attract substantial political interest and it may be difficult to shield contract negotiations from political influence. As a matter of good practice, however, the government would be advised to identify and define the government's political interests and to separate these from the technical process of securing the deal, ensuring the quality and integrity of the contract's final terms. To this end, the lead negotiator should be able to freely exercise his or her authority, within the scope of his or her mandate. It will be equally important also to ensure that the lead negotiator has access to, and the full confidence of the ultimate government decision-maker (e.g. head of government, cabinet, council of ministers or other executive body) in order to negotiate durable contract terms.<sup>14</sup>

#### Reporting back to the ultimate decision maker

Establishing clear information and reporting lines to the ultimate government decision maker is important to secure a durable contract.

If the award of contracts is subject to legislative or executive approval, the negotiation process will need to be carefully managed so as to minimise the potential for the negotiated contract to be overturned at a higher level. One means by which to reduce the risks of such an outcome would be for the lead negotiator to ensure that the negotiation is carried out in accordance with the negotiation mandate and terms of reference. If a deviation is made from that process, the lead negotiator is advised to report back to the lead agency or inter-ministerial committee to signal the potential discrepancy and request a revised mandate.

### Box 3. Negotiation experience in Ecuador

Ecuador assembled a strong multi-disciplinary negotiation team for the negotiation of the Mirador copper-gold project with Canadian investor, Ecuacorrientes SA in 2010.<sup>15</sup> A steering committee was established to provide guidance and advice to the lead ministry – the ministry of non-renewable resources. This committee included representatives from the ministry of strategic sectors and the department of taxation of the ministry of finance. The ministry of non-renewable resources also engaged the ministries of energy and transport in order to ensure the supply of power and upgrade of transportation infrastructure for the proposed mine. The government's negotiation team included senior specialists from Ecuador's more established oil sector who had comparable skills for the negotiation of a mining contract. The government also recruited foreign experts from Chile and the USA to provide certain expertise that was not available domestically. Consequently, the government's multi-disciplinary negotiation team was highly competent, professional, and responsive to the needs of the negotiations. This organisational composition worked reasonably well and consequently, government decisions were able to be made in a timely manner.

Key attributes that led to these successful negotiations include: the negotiation team was given a clear mandate from senior government officials to undertake the negotiations, subject only to the approval of the final terms and conditions by the president. The negotiating process was based on a model contract which was developed during one year from the International Bar Association Mining Law Committee's Model Mining Development Agreement,<sup>16</sup> with a moratorium on negotiations while the model contract was being developed. As a result, there was very little room left for negotiation in the agreement, which was tightly tied to the model contract, with some adjustments to reflect variations in geography and the specific nature of the project.

#### IV. EFFECTIVE INTEGRATION OF EXTERNAL ADVISERS

If a government has retained external national or foreign advisers to assist with the negotiation of an extractive contract, it would be important to establish accompanying institutional and operational protocols to take full advantage of their skills and knowledge. While human and institutional capacity building is a long-term endeavour which goes beyond the immediate needs for contract negotiations support, the government should seek ways to ensure that, wherever feasible, these experts assist to develop the institutional and technical capabilities of the government.

Transferring skills and knowledge between external advisers and local government officials may not be feasible in all cases, due to the highly specialised and technical nature of some of the work involved. To the extent practical, however, this can be achieved in the form of mentoring, twinning arrangements (that might, for example, pair foreign experts with local staff, including in the pre-negotiation stage to present the government with available alternative options), and on-the-job training.<sup>17</sup>

Government officials (particularly at director level or above) and national experts should also be directly involved throughout the negotiating process so that they can develop the institutional and technical knowledge needed to manage and monitor implementation of the resulting contract. Establishing clear information sharing and communication procedures (e.g. regular team meetings, ministerial briefings, etc.) and performance management arrangements within the responsible agencies of government can further help to ensure that external advisers share their knowledge and skills, and are effectively managed and supervised by senior officials in government (besides just the minister). The government is further advised to ensure that the scope of the advice requested, and performance management and reporting requirements are clearly set out in the external advisers' terms of reference. The *Terms of Reference Template for Recruiting External Advisers* in the Annex can assist governments in setting and monitoring some of those requirements.

## V. RETAINING EXPERTISE FOR FUTURE USE

Contract negotiations offer learning opportunities for government officials. It is important for the government to document and record these experiences, both to inform the implementation of the terms of the deal itself, and to inform the negotiation of future extractive contracts. It is also a constructive means by which to retain knowledge and expertise for future use, to the extent feasible.

Documenting and recording contract negotiations requires the establishment of basic information management and record-keeping capabilities, including archiving and storage of all relevant documents and transcripts (for example, the negotiation mandate and terms of reference, any ministerial briefs or updates, legal and technical analyses, and any transcripts of the negotiations themselves etc.). These materials are arguably best housed, either in the lead agency responsible for the negotiation or in the secretariat of the inter-ministerial committee or cabinet.

In addition to information management and record-keeping, it will also be helpful for the government to retain the skills of expert advisers involved in the contract negotiation either in-house or as external national or international consultants. The government may keep the very best of their international or national experts on a contractual retainer so that they may engage their services down the line. Secondly, to the extent possible, those government officials who negotiated prior contracts can be engaged to negotiate future or related contracts. Where the government has a policy of rotating officials between different departments, special consideration could be given to ensuring that these individuals remain involved in any related or future contractual negotiations.

### Box 4. Building greater negotiation capacity and expertise in Botswana

Botswana is an example of a resource-rich country that has deployed a well-qualified and multidisciplinary negotiation team by maintaining a consistent roster of negotiators through multiple contract negotiations to build greater capacity and expertise by:<sup>18</sup>

- developing a specific negotiation strategy for each project;
- recognising that the composition of the negotiation team was a critical factor and the government would pay special attention to the right mix of technical and professional skills of the team before entering negotiations;
- maintaining the same team of negotiators through several contract negotiations helped consolidate the experience and tactics of the team and was a winning strategy;
- procuring foreign advisers on a retainer basis (rather than just for a specific project); and
- taking the lead in drafting the documents used as the basis for the various rounds of discussions.

## **ANNEX: RECRUITING ADVISERS FOR EXTRACTIVE CONTRACT NEGOTIATIONS – TERMS OF REFERENCE TEMPLATE**

### **Purpose**

This document provides a template that governments may use to recruit and to monitor national or foreign advisers engaged to assist the government during extractive contract negotiations.<sup>19</sup> This *Terms of Reference Template* is intended to serve as a tool to ensure that the advisers recruited have the appropriate qualifications, technical and soft skills and experience, as well as professional competencies needed to advise government on the specifics of a contract. This document can also be utilised by support providers who recruit external advisers on behalf of governments for the same purpose. Furthermore, it can be used as a basis to compile a roster of experts for future reference. This document takes into due account and builds on the G7 CONNEX Code of Conduct.

This *Terms of Reference Template* is general in nature but serves as a baseline that can be adapted and amended to fit each request for external advice. Given the diverse nature of extractive projects, there is likely to be a wide variety of advice required. Broadly speaking, this advice may fall under the following categories: geological, engineering, and industry expertise; legal, economic, fiscal and financial expertise; and social and environmental expertise.

In terms of locating external support, a useful resource hub for governments is the Negotiation Support Portal (<http://negotiationsupport.org/>), an online platform that provides information and contact details for support providers who contract advisers upon request from governments.

### **Guiding principles**

#### **Harmonisation and alignment**

Governments need to ensure that any appointed national or foreign advisers are qualified to perform their role and equipped to meet the government's specific needs and interests.<sup>20</sup> When advisers recruited to assist government are financed by development partners, the government should still retain lead responsibility for the recruitment, management and supervision of any advisory services. Governments are also advised to proactively share the composition of the negotiation teams when they seek advisory support through development partners in order to fill any existing gaps and ensure that the government secures the best advisory services from donors. The terms of reference can provide for a dual reporting function, to government as the lead agency and to the development partner, as needed, with due consideration given to client-attorney privilege. When an adviser is recruited by a lead or single-line agency, the adviser will also be responsible to report to the senior government official who is the lead negotiator and to abide by the government's negotiation team's strategy and mandate.

The terms of reference should further make it explicit that the role of the adviser is to advise, it is not to lead or conduct the negotiations or make binding decisions on behalf of the government.

#### **Knowledge transfer and capacity development**

When engaging expert advisers (national or foreign) to assist in contract negotiations, governments should aim to secure individuals with the qualifications, technical and soft skills, expertise, and professional competencies needed to deliver the technical



specificities of the negotiation or task concerned. At the same time, it would also be important to use the opportunity provided by these experts to maximise opportunities to up-skill the capability of government officials, using a range of tools and approaches including twinning, shadowing, on-the-job training and mentoring.

One means by which to achieve this is to combine technical tasks with the responsibility to train or mentor designated counterparts in government, as part of the terms of reference. This can be particularly effective in cases where experts are paired with junior staff and they work jointly, for example, to prepare negotiation options for government or to develop financial models. Such arrangements must be set out upfront in the terms of reference.

Another approach, commonly adopted by government is to recruit highly skilled diaspora, who have the advantage of understanding the local context and culture, and have the potential for a longer-term, ongoing country engagement. Governments are encouraged to reach out and engage their diaspora, wherever possible.

Also important is ensuring that the advisory services provided contribute to the overall development of the institution in which the expert is working. This process can be facilitated through documentation and reporting, the development of systems and procedures, and knowledge and learning, not simply for expert counterparts, but for the institution as a whole.

### **Quality control**

In the interest of quality control, governments are advised to establish robust management and supervisory arrangements to monitor, track and evaluate the quality and content of any advisory services provided, together with the procedures followed. Governments will want to ascertain whether the advice provided was 'fit for purpose' and met the criteria established in the terms of reference, agreed at the start of the assignment through the Inception Plan. The Inception Plan and any interim or concluding reports can be used to measure the adviser's performance and outputs.

It is also important for advisers to demonstrate the ability to work collaboratively with the government's team constituted to conduct negotiations, and avoid counterproductive competition between experts. This requires full integration of the advisers into the government negotiation team and continuous effective communication with government officials and clear articulation of roles (e.g. team leader, expert on specific subject matter, facilitator to reconcile different views, etc.). One means by which to achieve this is to conduct interviews for adviser recruitments simultaneously to avoid competition among different ministries and build trust and good interpersonal dynamics within the team.

Subject to any confidentiality requirements, governments may also wish to make their evaluation(s), or part thereof, available to support providers, particularly where these advisers were financed by development partners.

## TERMS OF REFERENCE TEMPLATE

Government of [State], Ministry of [Mines/Energy/Petroleum/others]  
Terms of Reference for [insert specific function required] Adviser

---

<b>Location:</b>	[City, Country or Home-based]
<b>Agency:</b>	[Government agency to whom the adviser reports to]
<b>Application deadline:</b>	[Deadline for the application/bid/proposal]
<b>Starting date:</b>	[Proposed start date of advisory services]
<b>Duration:</b>	[Proposed duration of advisory services]

### Background

Explain the country profile with reference to the country's economy, legal framework and political system. Provide an overview of the country's known natural resource endowment and any relevant current or historical extractive projects.

Set out the overall programme of work on which the government is seeking advice. If the government requires advice in response to a specific proposal by an investor, include information on that proposal (i.e. type of commodity, identity of investor, location of proposed investment, etc.). What are the key outputs and indicators of success of the specific project? What work (studies, advice, construction etc.) has been undertaken thus far and how does that relate to advice sought under this terms of reference? What are the key drivers and milestones for the completion of the negotiations?

Who are the key players involved? It is necessary to identify the investor involved in order for potential advisers to ascertain whether they have a pre-existing relationship (conflict of interest) that may disqualify them from this assignment.

Which government agency is the lead agency for the negotiation of the extractive contract? What other agencies are involved in the negotiation process? Are there any third parties involved in the negotiation process (lenders, civil society, affected communities)? It is also helpful to detail the roles and responsibilities of each party to the negotiation. What is the proposed schedule of the negotiations? Are there any barriers that could cause delay to the negotiations?

Lastly, provide a brief overview of the government agency that is responsible for extractive contract negotiations, with its functions and responsibilities, and its current administrative capacity.

### Objectives/Scope

Set out the objectives that the government wishes to achieve. How will the assistance contemplated by the terms of reference contribute to the relevant contractual negotiations and to the government overall policies for the sustainable development of its extractive sector?

What is the purpose and scope of the assignment? (To provide advice, draft documents, train officials). What areas need to be covered, what level of detail/analysis is required? What are the intended outcomes of the work requested? What decisions might be influenced by its findings?

## Role of the adviser

The terms of reference should clarify that the role of the adviser is to advise, it is not to lead or conduct the negotiations or make binding decisions on behalf of the government.

While setting out the responsibilities that the adviser will assume, the terms of reference should clarify the scope of the adviser's overall responsibility under the term of the assignment (for example, providing technical advice on the commodity market or a specific subject matter, or facilitating inter-agency dialogue and building internal agreement, or keeping track of the multiple exchanges occurring, etc.). Which aspect of the negotiation is the adviser recruited to assist with? Who is the adviser expected to report to and interact with during the terms of the assignment? Does the adviser's role end when the extractive contract is signed or will the adviser have a role in the subsequent monitoring and implementation of that contract? Some examples include:

Working closely with the lead negotiator appointed by the [Head of Government, Lead Agency, Inter-Ministerial Committee], the role of the [Title] is to assist the [Director of Oil and Gas Operations] to conclude the operational terms of a production sharing agreement for [Area/Block].

And

Under the direction of the [Ministry/Inter-Ministerial Committee/Lead negotiator or other], the [title] will be responsible to review the draft provisions of the production sharing agreement proposed for [Area/Block] to ensure their consistency with the domestic laws of [country] and any relevant international standards and obligations. The [title] will also be responsible to ensure that these draft provisions are consistent with established industry practice. This assignment will be for [days, months, years] duration.

## Tasks and functions

Set out the tasks/functions the adviser will be required to meet, together with the deliverables expected to result from these activities. Tasks should be specific, measurable and clear. If a government has specific expectations around the structure, the format or the content of a deliverable, this should be set out clearly in the terms of reference. For example:

### **Task 1 – Contractual review**

- (a) Working with legal officials from the Ministry of Petroleum, review the draft provisions of the extractive contract with a view to ensure consistency with the [applicable] legal and regulatory regime of government, and to ensure consistency with the government's international obligations.
- (b) Offer alternative wording for provisions where needed, and provide a view as to whether the provisions of the draft contract are consistent with similar extractive contracts in other jurisdictions.

Another common task will involve the adviser undertaking technical analysis – for example, fiscal modelling – reporting back to the government, just-in-time, during the negotiation, or as part of a brief or report to the government. An adviser may also need to review the assumptions/content of the investor's proposal or may need to develop alternative options for the parties to the negotiation to consider. For example:

### **Task 1 – Fiscal modelling and analysis**

- (a) Upon receipt of the draft fiscal provisions proposed by the investor, model the varying fiscal implications of high and low commodity price assumptions.
- (b) Consider the fiscal implications of a commodity price shock at different stages of the project (e.g. exploration, development and production) etc.

Other tasks/activities may include complex policy matters such as ‘assisting the government to identify varying resource development scenarios’ or more administrative tasks such as ‘attendance at a set number of meetings/workshops’ or ‘site visits to the proposed project’ or ‘comparable projects in the country and/or region’.

## Deliverables

In addition to specific tasks and functions, the terms of reference should also define any products or deliverables expected to be produced during the course of the assignment. The terms of reference should further define the timeframe (milestones) and a set of measureable criteria against which these products (and any specific tasks or activities) will be assessed. These criteria will differ depending on the specific task/activity or deliverable in question. If there are applicable industry standards (for example, ISO’s, JORC Code or SAMREC),<sup>21</sup> these standards can be used as measurable criteria. If no specific industry standards are applicable, governments may require that deliverables are completed “in accordance with the established laws, regulation or policy of government”, or “in accordance with good industry practice”.

Ideally, there should be several deliverables which are required to be met in stages in order for the government to track the progress of the advice and to identify any issues with the advice at the earliest reasonable opportunity.

## Selection criteria

Governments need to have a clear idea of the qualifications, skills, knowledge and experience and professional competencies of the adviser that they are seeking. These criteria should be set out clearly to avoid receiving a large number of applications from inexperienced and/or unsuitable advisers.

### Qualifications

Set out the educational requirements that prospective advisers may need to possess. For example, advisers may be required to have qualifications in the following fields: geology, engineering, legal, economic, financial expertise, commercial, social, environmental etc.

Governments will need to specify whether advisers are required to hold degrees in their relevant discipline at an undergraduate or postgraduate level and specialisation in particular relevant fields in a given discipline. Governments are advised to specify the nature of the qualifications sought – for example, do they need to be from a recognised tertiary institution? Does a postgraduate qualification need to be at masters or at a doctorate level? With specific regard to legal expertise, governments are further advised to require specialised knowledge and practice of national laws (e.g. public law, mining, infrastructure, land, licencing).

Advisers may also be required to be members of professional associations. For example, a petroleum engineer may be required to be a member of the Society of Petroleum Engineers (SPE) or a geologist may be required to be a member of a professional body, such as the American Association of Petroleum Geologists (AAPG). Legal advisers may be required to be called to the Bar/registered to practice in specific jurisdictions.

Legal advisers, accountants, engineers and other advisers may be required to hold current professional certifications.

If no qualifications are required or if a lack of qualifications can be offset by relevant industry experience, this should be set out clearly.

## Skills and experience

The terms of reference should stipulate the skills and experience the ideal adviser should possess both in terms of specific soft and technical skills, as well as in terms of the number of years of experience, and the specific relevance of that experience for the assignment, including lessons learned from previous similar assignments related to complex extractive contracts negotiations and strong commitment to team environment dynamics with the ability to contribute expertise and work collaboratively.

For example, the ideal candidate will have *”demonstrated fiscal modelling skills and experience, with 15 years of relevant industry experience advising governments on the fiscal elements of extractive contracts”*.

Governments should specify the exact nature of the skills and experience they are seeking in order to attract advisers with the appropriate and relevant experience. For example, there are many different types of geotechnical experts and if the government is seeking an experienced geophysicist, a geologist with a basic understanding of geophysics will likely not suffice.

Besides technical skills, soft skills are needed to support effective negotiations, capacity building and knowledge transfer. Indeed communication skills, facilitation (for example of the internal negotiations to reconcile views from different ministries and agencies), expectations regarding capacity development and proven ability to work well with government officials and local experts, and proven adaptability to differing cultural environments should be set out clearly in the terms of reference.

The terms of reference can further define any ‘preferred or desired’ skills or experience, which may or may not be found in a given pool of advisers. For example, does the government want an adviser who has had previous experience advising governments in comparable situations? Does the government want an adviser who has also had experience advising investors, such that s/he would have an understanding of specific industry dynamics and the motivations or tactics that might be used by investors during the negotiations? The government may want an adviser who has had experience advising other governments in the same region, or who has had experience advising governments on projects similar to the current proposal. Similarly, the government may want an adviser with extensive experience in mentoring or training others.

It will also be appropriate to specify any language requirements. Depending on the nature of the advice sought and specifics of the terms of reference, the adviser may need to be familiar with the official/working language of the country (the negotiations with the investor may be undertaken in this language). Other examples may include: country specific skills and/or experience (familiarity with civil and/or common law or practice of national laws on mining oil and gas, infrastructure, licencing and other related fields or local cultural norms) or familiarity with certain software or international frameworks (e.g. Equator Principles).

## Competencies

In addition to skills and experience, it is always useful to detail the particular professional competencies that may be expected of an adviser. Depending on the nature of the particular role, leadership, achievement focus, written and communication skills, teamwork, cultural and diplomatic sensitivity and ability to manage complex tasks, are some examples of commonly used professional competencies against which the performance of adviser can be measured.

The terms of reference and contract for the adviser should also note that, *'if selected, the adviser commits to abide by all the principles of the G7 CONNEX Code of Conduct, which are attached as an Annex to this Terms of Reference'*.

## Location

The terms of reference needs to state the location where the advisory services are required (usually the national capital) to clearly set expectations from the outset. If some (or all) of the advisory services are able to be performed remotely, this should be stated alongside a breakdown of the required number of days (and specific dates) when the adviser must be on location.

If any travel is required as part of the advisory services, this should be made clear in the terms of reference. For example, a certain number of site visits may be necessary to the proposed mine site, the investor's headquarters or to another mine operated by the investor.

## Remuneration

Governments may have a set fee determined for the provision of the required advice. In this case, governments may wish to indicate the amount of compensation that will be payable to the adviser in the terms of reference. If so, the terms of reference should set out the currency that the adviser will be paid in, whether or not the payment will be subject to personal income tax (in that country), and the frequency of the payment(s) (in advance, in instalments or upon completion).

If governments are expecting advisers to cost their own proposals, the following information should be requested:

- Fees proposal, expressed in [relevant currency];
- Assumptions;
- Rates practised and preferential rates for different members of the proposed team (partner, associate, financial adviser, etc.);
- Payment schedule proposed for deliverables of each component;
- Estimate of the number of hours required to complete the assignment;
- Mechanism to minimise expenses and cost monitoring method;
- Estimate of fees (travel, costs for attending meetings and other forecast expenses).

## Evaluation criteria

The terms of reference should clearly set out the method and the process by which advisers will be selected. The two common methods of selection are the quality-based selection method and the cost-based selection method.

### Quality-based selection

The quality-based selection method uses objective evaluation criteria in order to ensure recruitment of the most qualified candidate as adviser. Ordinarily, the key attributes required for the advisory service(s) (qualifications, skills and experience, professional competencies) are each given a percentage weighting. The percentage weighting will need to be set in each terms of reference and may differ as different key attributes may attract greater/lesser importance depending on the nature of the advice requested.

The following objective evaluation criteria should be included in each terms of reference but can be tailored to fit each specific request:

**1. Qualifications** [X] %

- A [postgraduate/masters/PHD etc.] degree from an accredited university in [insert relevant field/specialised knowledge, e.g. law, geology, accounting etc].
- [Any additional education or training requirements].

**2. Experience** [X] %

- Minimum [x] years of experience in the specific sector, field, subject, relevant to the particular assignment. [Length of relevant experience, and similar assignments in developing countries]. Knowledge of the region and regional experience. Previous experience in [COUNTRY NAME]. Minimum [x] years of practice of national laws on mining, oil and gas, infrastructure, licencing, public law and other related fields.
- Experience in institutional advice, and support to governments and public authorities in relation to [nature of advice required]. Recognition of expertise in [insert specific field] by peers. Track record of publications, and demonstrated learning and development.

**3. Skills and competencies** [X] %

- Demonstrated expertise on the [insert soft/technical or specialist subject matter].
- Fluency in [language] both spoken and written.
- [If relevant, expertise in knowledge transfer and capacity building (e.g. holding training session for government representatives)].
- Specific expertise in [insert where relevant: sustainable development issues, sensitivity in cultural and political issues, knowledge of the local language, culture, administrative system, government organisation, specific IT software etc.]
- Familiarity with [World Bank/UNDP/AfDB etc.] financing and procedures, if applicable.

**4. Methodology** [X] %

- An analysis of the methodology/proposal put forward. Consideration will be given to the proposal's logic, timeliness and consistency with international good practice.
- Consideration will be given to the applicability of the proposal to the specific country context (as opposed to only providing generic advice/solutions).
- [If relevant, consideration will be given to the proposed methodology of knowledge transfer and of capacity building.]
- Consideration will be given to the level of participation by national experts in the assignment. This will include the number of national experts and the expected role and contribution of those experts.

Prospective advisers can then be assessed against the criteria and subsequently ranked according to their score. This method promotes transparency and predictability and can build confidence in the procurement practices of a government.

## Cost-based selection

The cost-based selection method seeks to recruit an adviser at the lowest available cost. The government is advised to have a clear understanding of the market size in terms of available skill sets. This method is more appropriate for selecting advisers for assignments of a standard or routine nature where proposals are likely to be similar. Proposals received via the cost-based selection method should still be subject to a minimum quality requirement, in order for the government to be satisfied that it is receiving competent advice.

## Fiduciary obligations

The terms of reference should make reference to a number of fiduciary obligations that a government will require an external adviser to observe should a contract for services be entered into.

**Standard of Conduct** – Advisers shall observe the highest standards of ethical conduct in carrying out their duties for the government and shall act with integrity, honesty and probity in all dealings with the government, the development partner and others with whom the advisers come into professional contact in the course of activities contemplated herein. An adviser shall strive to establish the trust and confidence of his or her principals and to avoid even the appearance of impropriety in his or her conduct and to avoid behaviour that would reflect adversely on the adviser, government or development partner. [See paragraphs 1 and 2 of G7 CONNEX Code of Conduct].

**Independence** – External advisers shall maintain their professional independence and be afforded the protection of such independence in giving governments unbiased professional advice and representation [see paragraph 3 of G7 CONNEX Code of Conduct].

**Role and responsibility** – External advisers shall treat government interests as paramount, subject to their duty to observe the law and to maintain ethical standards. External advisers are not decision makers, all decisions remain the responsibility of the government. An adviser shall provide his or her professional opinion on issues under consideration, as well as information and analysis, to help the government decide upon its interests, priorities, and strategies, to assist the government in understanding options, and to weigh the trade offs that may be involved when goals conflict [see paragraphs 8-10 of G7 CONNEX Code of Conduct].

**Professional standards** – Advisory work shall be carried out in a competent, professional, and timely manner. An external adviser shall not take on work that they do not reasonably believe can be carried out in the manner requested for reasons of competence, personal conflicts, professional conflicts, workload, physical or mental illness, or other personal or professional reasons. An external adviser shall act only within his or her level of competence and shall clarify any limitations to the government when asked to act outside of the level of his or her competence.

External advisers will not communicate independently of the government with a potential investor or its advisers, unless explicitly asked to do so by the government.

If the government negotiation team has a designated lead negotiator, the adviser will follow the directions of the lead negotiator, subject always to the advisor's duty to observe the law and to maintain ethical standards [see paragraphs 13-16 of G7 CONNEX Code of Conduct].



**Corrupt practices** – External advisers shall not offer or make any payment of cash, or other transfers of value, to a government, official, family member of an official, or a business associated with an official, to obtain an assignment or for any other reason. This prohibition shall remain in force for at least two years after the advisory role is completed.

External advisers may accept gifts for reasons of courtesy, but will be obliged to cede those gifts to the government who will decide on the means by which such gifts shall be disposed or used.

In case of investigations following the suspicion of corrupt practices, external advisers are obliged to fully cooperate with the investigating authority [see paragraphs 17-20 of G7 CONNEX Code of Conduct].

**Conflict of interest** – A conflict of interest exists where an adviser has a relationship or an interest that may adversely affect his/her ability to provide impartial and professional advice to a government. Conflicts of interest may take a variety of forms: legal, commercial or sector conflict.

Advisers should not be recruited for any assignment that would be in conflict with their prior or current obligations to other clients (e.g. other governments or investors), or that may place them in a position of being unable to carry out the assignment in the best interest of the government.

External advisers shall disclose any financial, business, or personal interests (including the interests of family or other relevant associates) that might be in actual or apparent conflict with their obligations to the government under the terms of reference, or a subsequent contract for services. This disclosure must be made initially in any submission/bid/application by a prospective external adviser and again immediately prior to entering into any contract for services.

If the external adviser becomes aware of an actual or a perceived conflict of interest during the course of their assignment, this conflict must be disclosed to the government at the earliest available opportunity. Advisers should be aware that any subsequent disclosure may result in that adviser being removed from the assignment.

If a disclosure is made, the government should decide whether that conflict of interest disqualifies that external adviser or whether that conflict can be effectively managed and the adviser can be retained. For example, if a prospective adviser has previously advised an investor with whom the government is now negotiating, it may be possible for that adviser to be retained in a limited capacity, provided appropriate safeguards are met. For example, a government may put in place measures where the adviser has restricted access to certain information/personnel, is only involved in a certain part of the project, or is shadowed by a government official.

Through the course of their assignment, external advisers shall avoid situations and actions that compromise, or could appear to compromise, their ability to carry out, in a competent and personally disinterested way, their responsibility to provide the best professional advice to governments.

Advisers shall not misuse their position to pursue their own private interests, which include financial or personal interests and those of their family members, relatives, business associates and friends [see paragraphs 18-21 of G7 CONNEX Code of Conduct].

**Confidentiality** – External advisers shall not use information gathered during the course of the provision of advice for any purpose other than the provision of advice to the government and shall take all appropriate steps to safeguard such information.

External advisers shall treat communications with a government as confidential and privileged, and shall not disclose such communications except as required by law or as permitted by the government [see paragraphs 35-37 of G7 CONNEX Code of Conduct].

## Reporting and supervision

The terms of reference should outline clear reporting and supervision arrangements to ensure timely and quality delivery of the assignment and to allow the government to modify and manage the terms of the assignment as needed. Effective supervisory arrangements will include clear vertical and horizontal reporting arrangements within governments, which may or may not include regular meetings or briefings, written reports, etc. In the event that a donor partner is financing the adviser, dual reporting may be needed (i.e. both to government and to the donor partner), however any dual reporting arrangements must respect basic principles of confidentiality or client privilege, so as to maintain the confidence of government and the confidential nature of any contract negotiations. In all cases, the adviser should report to a senior official in government.

As an example, the terms of reference could stipulate:

The adviser will work in the [department/division/directorate], reporting to the Director of the Division, and to [donor partner] on any tasks or activities undertaken during the assignment. The adviser will also work closely with [ministry/agency/department or directorate] to share information and provide regular updates on progress.

And alternative approach could be as follows:

The adviser will jointly report to [minister/lead negotiator/director] and [development partner], briefing them at the start of the assignment and periodically throughout on progress with the assignment. In the event the adviser is subject to a dual reporting arrangement, the adviser shall maintain confidentiality on all matters required by government, in line with the principles of client privilege. The adviser will also work in close collaboration with each of the following [negotiation team/government officials/government partners] to ensure a harmonised and coordinated approach to the negotiation.

As a matter of good practice, under the terms of reference, the government is further advised to request the following reports or briefings from the adviser:

### **Inception report or study**

Preparation of an inception report or study is an opportunity for the government and external adviser to identify and agree specific tasks, milestones, deliverables and timeframes for the assignment at the outset. This inception plan should be provided to the government in the initial week or two of the assignment. The inception plan must address any specific timeframes or reporting requirements that are set out in the terms of reference.

This inception plan should be approved by the senior government official responsible for this assignment, before proceeding with the program of work.

## Interim reports

Interim reports can serve to keep the government informed of the adviser's progress throughout the assignment. These interim reports can give the government assurance that work is being undertaken and that the advice is delivered within the specified timeframes.

It can also help governments to identify any adviser performance issues that may require remediation.

Interim reports will be required on a [weekly/monthly/quarterly etc.] basis.

## Final report

In accordance with the inception plan, the adviser will be required to produce a final report setting out both the content of their advice and the process followed. Any departures from the agreed timeframes/milestones in the inception plan should be explained and if any conclusions between the inception or interim reports and the final concluding reports differ, the basis for this change should be explained.

## Application process

The Ministry of [Mines/Petroleum etc.] invites you to submit a [Cover Letter, Curriculum Vitae and any applicable references] or a technical/financial proposal for this project as appropriate, consisting of: [insert key details of advice required]

The technical offer must include complete answers to questions raised in these terms of reference, as well as all supplementary information deemed useful and pertinent. The appropriate adviser will be selected after a detailed review of his or her Cover Letter, Curriculum Vitae, and any reference or after a detailed review of the technical/financial proposal, based on selection criteria set out above.

The Ministry of [Mines/Petroleum etc.] expects the selected candidate to supply top quality services, reflecting good international practices, as appropriate to the given country context.

Applications should be submitted to [contact details of relevant Ministry] by [due date of proposals].

On receipt of the proposals, the Ministry of [Mines/Petroleum] shall analyse the details of the application and select a suitable candidate adviser. All individuals who have submitted an application will be notified of the outcome.

The terms of reference should set out the different stages of the selection process and give indicative timeframes for each stage. If interviews are contemplated as part of the process, then details (timing, location etc.) of this should be clearly laid out to avoid the withdrawal of any prospective advisers.

The terms of reference could also explicitly state that 'Any proposals evidencing illegal and corrupt practices in the award or procurement of the contract for services will be rejected'.

## Appendices

Include any necessary additional documents. For example, governments are advised to include the G7 CONNEX Code of Conduct, and any relevant publically available information on the proposed extractive project such as a pre-feasibility or scoping study. Reference to the government's extractive legislation may also be relevant.

## Notes

1. See *Terms of Reference Template*, section on Reporting and Supervision.
2. See Section II on Expertise needed for effective contract negotiations and the role of the legal adviser as “facilitator”.
3. Kienzler, D. et al (2015), *Natural Resource Contracts as a Tool for Managing the Mining Sector*, Bundesanstalt für Geowissenschaften und Rohstoffe (BGR), Hannover, [www.bgr.bund.de/DE/Themen/Zusammenarbeit/TechnZusammenarbeit/Politikberatung\\_SV\\_MER/Home/politikberatung\\_svmer\\_node.html](http://www.bgr.bund.de/DE/Themen/Zusammenarbeit/TechnZusammenarbeit/Politikberatung_SV_MER/Home/politikberatung_svmer_node.html) at 47.
4. Comité Technique de Revue des Titres et Conventions Miniers (2012), *Terms of Reference - Mining Contracts Review Process* (English), CTRTCM, Conakry, [www.contratsminiersguinee.org/](http://www.contratsminiersguinee.org/), accessed 4 October 2016.
5. A non-exhaustive list of geological and engineering information that may need to be analysed to inform the negotiations may include (where relevant): geological (surveys of the geology of mineral deposits); geophysical (aeromagnetic data surveys, 2D & 3D seismic surveys); geochemical (sampling of soils, waters, and bedrock to determine mineral possible minerals occurrences and quality); hydrological (mapping of drainage channels and other watercourses); reservoir engineering and modelling (producing a geological model of a petroleum reservoir to obtain high economic recovery) or, for early exploration ventures, selection of an appropriate analogue field (taking into account factors like field size, reservoir, operating environment); mine plan (plan to evaluate the economically recoverable portion of the mineral deposit).
6. See Section IV on Effective integration of external advisers and *Terms of Reference Template*, Section on Guiding Principles, Quality control.
7. See OECD (2016), *Collaborative Strategies for In-Country Shared Value Creation: Framework for Extractive Projects*, OECD Publishing, Paris, at 12-17.
8. Ibidem, at 18-21.
9. Kuruk, P (1991), “Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience” in *Michigan Journal of International Law*, Vol 13:43, Michigan at 69.
10. See Principles for responsible contracts integrating the management of human rights risks into state—investor contract negotiations, New York and Geneva, 2015 HR/PUB/15/1 (United Nations publication, Sales No. S.15.XIV.5) at 6: “[...] integrating human rights in the negotiations will: (a) Facilitate the early identification and early management of the investment project’s potential negative human rights impact; (b) Help establish clear roles and responsibilities for the prevention and mitigation of any potential impact and the remedy of any impact when it does occur; (c) Help the parties make appropriate assessments and cost allocations for the prevention, mitigation and remedy of any negative human rights impact; (d) Facilitate cooperation and the effective management of issues as they arise throughout the project’s life cycle.
11. Ibidem, at 14: “[...] if the contract—in line with international lending standards—requires environmental and social impact assessments before significant activities are carried out, the State must ensure that it has the capacity to effectively review, evaluate and take appropriate and timely action on these assessments”.
12. Ibidem, at 26: “the State and the business investor can define their expectations and responsibilities for carrying out community engagement at the time of negotiating the contract. For example, the parties can agree: (a) that a plan for engagement will be developed in an inclusive manner before project activities affecting local individuals or communities begin; (b) that specific prevention and mitigation measures will be developed, where possible, with those at risk of being affected; and (c) to minimum criteria for effective engagement”.
13. On the role of diaspora, see *Terms of Reference Template*, Section Guiding Principles, knowledge transfer and capacity development.
14. Kienzler, D. et al (2015) at 46.
15. Andrews, C. (2012), How To “Get To Yes” The Practitioner’s Guide To Negotiating Mining Investment Agreements Lessons From Ecuador, *Working Paper No. 90*, Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, Wellington, [www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/working-papers/WP90.pdf](http://www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/working-papers/WP90.pdf).
16. The International Bar Association Mining Law Committee’s Model Mining Development Agreement provides a template and a check list of issues for use in negotiations between host governments and mining companies and can form the basis for the development of a model contract to guide the negotiations [www.mmdaproject.org/presentations/MMDA1\\_0\\_110404Bookletv3.pdf](http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf).

17. See also *Terms of Reference Template*, Section Guiding Principles, knowledge transfer and capacity development.
18. Criscuolo, A. (2008), *Briefing Note – Botswana*, The World Bank, [http://siteresources.worldbank.org/INTEPCOMNET/.../Briefing\\_Note\\_-\\_Botswana.doc](http://siteresources.worldbank.org/INTEPCOMNET/.../Briefing_Note_-_Botswana.doc), at 11.
19. For the purposes of this *Terms of Reference Template*, ‘external advisers’ refers to any individual consultant, national or international, recruited to provide advisory services to government.
20. See Section II of the guidance, Section II, Expertise needed for effective contract negotiations - Where to source the required expertise?
21. ISO’s refer to standards set by the International Organisation for Standardisation. The JORC Code refers to the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves. SAMREC refers to the South African Code for the Reporting of Mineral Resources and Mineral Reserves.

## ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

### OECD DEVELOPMENT CENTRE

The Development Centre of the Organisation for Economic Co-operation and Development was established in 1962 and comprises 27 member countries of the OECD: Belgium, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. In addition, 25 non-OECD countries are full members of the Development Centre: Brazil (since March 1994); India (February 2001); Romania (October 2004); Thailand (March 2005); South Africa (May 2006); Egypt and Viet Nam (March 2008); Colombia (July 2008); Indonesia (February 2009); Costa Rica, Mauritius, Morocco and Peru (March 2009); the Dominican Republic (November 2009); Senegal (February 2011); Argentina and Cabo Verde (March 2011); Panama (July 2013); Côte d'Ivoire, Kazakhstan and Tunisia (January 2015); the People's Republic of China (July 2015); Ghana and Uruguay (October 2015); and Paraguay (March 2017). The European Union also takes part in the work of the Centre.

The Development Centre occupies a unique place within the OECD and in the international community. It provides a platform where developing and emerging economies interact on an equal footing with OECD members to promote knowledge sharing and peer learning on sustainable and inclusive development. The Centre combines multidisciplinary analysis with policy dialogue activities to help governments formulate innovative policy solutions to the global challenges of development. Hence, the Centre plays a key role in the OECD's engagement efforts with non-member countries. To increase the impact and legitimacy of its work, the Centre adopts an inclusive approach and engages with a variety of governmental and non-governmental stakeholders. It works closely with experts and institutions from its member countries, has established partnerships with key international and regional organisations and hosts networks of private-sector enterprises, think tanks and foundations working for development. The results of its work are discussed in experts' meetings as well as in policy dialogues and high-level meetings, and are published in a range of high-quality publications and papers for the research and policy communities.

For more information on the Centre, please see [www.oecd.org/dev](http://www.oecd.org/dev).

## OECD Development Policy Tools

# Guidance to Assemble and Manage Multidisciplinary Teams for Extractive Contract Negotiations

The series *OECD Development Policy Tools* aims to provide decision makers with innovative policy frameworks and guidelines to design, implement and monitor development policies. It covers a wide spectrum of domains and supports country-level implementation for greater impact. It builds on cross-country comparative analysis and benefits from discussions with OECD and non-OECD countries as well as non-government stakeholders.

The Guidance is intended to offer host governments the tools they need to assemble and manage a multidisciplinary team, and engage effectively in extractive contract negotiations. The Guidance aims to help governments to put in place recommended processes and identify the skills that governments may need to prepare for and conduct effective contract negotiations. This Guidance further suggests ways to ensure co-ordination within government and better integration between government officials and expert advisers. Annexed to this Guidance is a Terms of Reference Template that governments may use to recruit and to monitor external advisers engaged during extractive contract negotiations. The Template can also be utilised by support providers who recruit external advisers on behalf of governments for the same purpose. While recognising that human and institutional capacity building is a long-term endeavour, the Guidance suggests, wherever possible, practical ways to capture and retain the necessary soft and technical skills for successful negotiations.

Consult this publication on line at <http://dx.doi.org/10.1787/9789264274914-en>

This work is published on the OECD iLibrary, which gathers all OECD books, periodicals and statistical databases. Visit [www.oecd-ilibrary.org](http://www.oecd-ilibrary.org) for more information.

